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Supreme Court, U.S.
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In The

Supreme Court of the United States

MARIA GUADALUPE FONCECA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the showing required to establish venue in the charging district where the Defendant had never been present during the course of a conspiracy, and the evidence does not establish her knowledge and/or participation at any time when acts occurred in the charging district?

2. Is a defendant charged in an "historical conspiracy" entitled to access to agents' formal reports of interviews with cooperating witnesses?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maria Guadalupe Fonceca, through counsel, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 19, 2007, in which petitioner's convictions pursuant to 21 U.S.C. section 841(a) were affirmed in a non-published Opinion.

I.

JURISDICTION

On March 19, 2007, the Court of Appeals issued its Opinion affirming petitioner's convictions. (Appendix "A") Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

III.

STATEMENT OF THE CASE

A. Proceedings Below

By Indictment Petitioner Fonceca was charged with 21 U.S.C. section 846 (Count 1) and 18 U.S.C. section 1956(h) (Count 2). (ECR 7-11, Exhibit 2)[1] The matter came on for jury trial on June 20, 2005 through June 24, 2005 before the Honorable Walter S. Smith, Judge Presiding. (ECR Exhibit 1, pages 9-12) Petitioner was found guilty on both counts. (ECR Exhibit 3, pages 227-229) On August 31, 2005 Petitioner was sentenced to the Bureau of Prisons for 294 months as to Count 1, and 240 months as to Count 2, concurrent to Count 1. (ECR Exhibit 4, 244-249) A Notice of Appeal was timely filed on September 6, 2005. (ECR Exhibit 5, pages 250-251)

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[1] ECR refers to the Record Excerpts in this matter.

B. Statement of Facts

In September 1998 an investigation began of Valente Martinez. (R.T. 42,43,50) At the time, methamphetamine was going for $6000.00 a pound; a pound of ice went for between $16,000 and $20,000. (R.T. 45) Pure pounds of methamphetamine were transported from California or Tijuana to the Dallas area where it was then cut and sold. (R.T. 46,69, 74,75,81,82) Martinez' arrest led to the identity of Rudy Ayala. (R.T. 51) Martinez and Ayala had an association together in the methamphetamine trade. (R.T. 51) Several assets, including an apartment complex, two homes and a vehicle were traced to Ayala. (R.T. 51-53,75, 105,106, 116,117) There was no indication Petitioner Fonceca or Perez had any interest in those assets. (R.T. 75,76,83) The properties were forfeited to the United States. (R.T. 106) Carrasco was arrested in August 2002. (R.T. 59) Nieto in October 2003. (R.T. 59) Ayala turned himself in on July 30, 2002. (R.T. 59) On July 9, 2002 Ayala, German Neito, Noe Luana, Felipe Dominguez, Steve Carrasca, and others were indicted. (R.T. 54,58,59) On July 25, 2002 search warrants were executed on Ayala's home, his parent's home, Luna's house and Nieto's house. (R.T. 53,54) Drug ledgers for pound quantities of methamphetamine were found at Ayala's. (R.T. 54-57, 77,78,93-96, 119-121,123,124) One ledger referenced vitamins for 1,000 and a notation to "cook." (R.T. 141,142) The drug ledgers contained no reference to Petitioner Fonceca. (R.T. 78, 95,96) Martha Perez was identified by Ayala to be referenced in the ledgers as a mule. (R.T. 81, 89,90) She lived in Phoenix, Arizona. (R.T. 82,151,158,202) Also found was a receipt from Master Made Feeds, Inc. for 8 MSM. (R.T. 95) Large amounts of cash, a Rolex watch, two mink coats, methamphetamine and firearms were

found. (R.T. 77,137,165) Plane tickets with Ayala as passenger were found. One dated July 14, 2001 was a flight from Dallas. (R.T. 101,102) Another dated September 6, 2001 was an electronic ticket with Ayala as passenger flying from Dallas to Los Angeles. (R.T. 102, 103) Another ticket for Ayala was from Ontario, California to Dallas. (R.T. 103,104,122) A boarding pass in his name listed Long Beach and Dallas Fort Worth. (R.T. 104) An April 25, 2002 Holiday Inn Hotel receipt in Ayala's name had Nieto's address. (R.T. 123) A picture of Ayala and Dominquez was found. (R.T. 121,122,125) No evidence was found of methamphetamine manufacturing. (R.T. 136-138)

At Neito's residence was a phone number for Ayala and scales. (R.T. 126,127) Methamphetamine and guns were also found as was a ledger. (R.T. 144-146) No evidence of methamphetamine manufacturing was found. (R.T. 136-138)

Assets from Ayala, Fernando Ramerez, David Ross, and Angel Nunez were seized, forfeited and sold with a net of $2 million. (R.T. 129-134)

Rudy Ayala had pled guilty to conspiracy to distribute methamphetamine and money laundering. He received sentence reductions in his matter for cooperating. He was hoping for another Rule 35 reduction as a result of his testimony in this case. (R.T. 215-218, 302-305, 312,335,336,353,354) He testified that in 1998 he met Valente Martinez in Dallas. Martinez rented some apartments from Ayala. (R.T. 220) Ayala started helping Martinez by weighing methamphetamine and delivering it. (R.T. 221) He also collected money for Martinez. (R.T. 221,223) He delivered to Victor Castillo, Josh Homer, and others. (R.T. 222) The methamphetamine came from Mexico. (R.T.

224) Toward the end the methamphetamine was cut with MSM, a horse vitamin. (R.T. 223) After a while Ayala got his own clientele, got his drugs from Martinez, and sold them. (R.T. 267-269)

In 1999 Martinez was charged in a methamphetamine conspiracy. (R.T. 223,224) Ayala had a hard time getting supplies. (R.T. 224,225) In 2000 Ayala met Felipe Dominquez in Dallas; Dominquez was from California. (R.T. 225,226) Dominguez brought a pound and a half of ice with him. (R.T. 226,227) Next time he got four pounds of methamphetamine powder from Dominguez. They cut it with MSM. (R.T. 227-228) Dominguez and his wife Maritza brought it by train. (R.T. 230,231) Ayala met them at San Antonio and they drove to Dallas. (R.T. 231) Ayala went back to California with Dominguez to get more methamphetamine. They went to an apartment in Fullerton. (R.T. 230,231) Maria and Dominguez spoke. Ayala stayed out in the livingroom. (R.T. 231,232) They later met Maria Fonceca at a car wash and they got the drugs. (R.T. 233) It was 10 pounds. (R.T. 233,234) Dominguez and Maritza took it back to Dallas by train. (R.T. 233,234) The methamphetamine was cut and sold to Fernando Ramirez. (R.T. 234,235) Maritza made 1,000 per pound to transport the methamphetamine. (R.T. 234)

Ayala received methamphetamine around every 2-3 weeks. (R.T. 236) He flew back to California six, seven times. (R.T. 236,237) He would meet with Dominguez to discuss acquiring more methamphetamine. (R.T. 237) On four occasions Petitioner would come to the apartment and discuss the amount of methamphetamine to be sold, and provide it to them. (R.T. 237,238) They always got 10 pounds. (R.T. 240) There were occasions when they traded

with Petitioner vehicles for pounds of methamphetamine. (R.T. 260-262,343,344)

After the second receipt of drugs in Dallas, Martha Perez began to transport the methamphetamine from California to Dallas. (R.T. 241) She was paid $1000.00 per pound. (R.T. 242) One time at Dominguez' house in Ontario, California, Martha had methamphetamine taped to her body. (R.T. 243,244) She also transported currency to California for the purchase of more methamphetamine. (R.T. 243) Ayala said she did this three or four times. (R.T. 258,259) When Martha arrived in Texas she would contact either Ayala or Dominguez by cell phone. (R.T. 244,246) Ayala switched out his cell phone often; Mario Delatorre would get the cell phones for him. (R.T. 245)

On one occasion $150,000 was put in the door panels of a Tahoe and driven to California by Dominguez, Maritza and Carrasco. (R.T. 247, 278,279) He did not recall the month. (R.T. 278) Part of the money was Felipe's and part of it was for drugs to be bought from Petitioner. (R.T. 247,282) He testified that on one occasion Petitioner brought one pound to Dallas and gave it to Dominguez. There had been an issue over the quality of a prior product. (R.T. 287-289,294,295,344,352,353)

Fernando Ramirez got raided and Ayala took over his business. (R.T. 251-253) Steve Carrasco helped Ayala by making deliveries and picking up money. (R.T. 254)

Around March or April of 2001 Ayala parted ways with Dominguez and Petitioner. (R.T. 256,257,287,325,326) His supply of methamphetamine then came from Luis in Riverside, California. (R.T. 257,296) Thereafter Martha Perez twice transported ten pounds for him. (R.T. 257) Thereafter Carrasco transported it by truck. (R.T. 258)

Ayala used the money that he earned from drug dealing to purchase houses, cars, fur coats, Rolexes and chains. (R.T. 265-267)

Steve Carrasco testified that he was in custody for having pled guilty to money laundering and drug conspiracy in 2002. (R.T. 355,356,427) He was sentenced to 130 or 135 months. (R.T. 375,409,427) It was later reduced to 108 months. He cooperated with the government and was hopeful for another sentence reduction. (R.T. 375,376,377,410,417) He had been involved with Ayala and Felipe Dominguez. (R.T. 356) Beginning in 2000 Carrasco transported vehicles from Dallas to California, made deliveries of methamphetamine and picked up money. (R.T. 356-360, 401) He also bought horse vitamins to cut the methamphetamine. (R.T. 359)

In December 2000 he drove a metallic orange Tahoe to California and turned the vehicle over to Felipe Dominguez. (R.T. 361, 382-386) Ayala had told him to drive it to California to be sold. (R.T. 383) During that trip he met Petitioner at an apartment complex. (R.T. 362,363) Dominguez and Petitioner had a discussion that Carrasco was not involved in. (R.T. 363)

Another time he drove a champagne colored Tahoe to California with Dominguez and his wife. It had money in it but he did not know that at the time. (R.T. 364,387,388,391-393, 401) On that trip he and Dominguez met Petitioner at an apartment complex. He saw a bag exchanged. (R.T. 365,366) He did not know what was in the bag. (R.T. 366) During that trip a meeting occurred at Dominguez' house whereupon bags were strapped around Martha Perez. Carrasco, Dominguez, Martha, and Petitioner were present.

(R.T. 367,377,406,419,420) Dominguez and Carrasco then dropped Martha off at a bus station. (R.T. 367,419)

Another time Carrasco and Nieto drove a blue Tahoe containing money to California. (R.T. 368,386,387) He and Dominguez met Petitioner at an apartment complex where Petitioner and Dominguez spoke. He did not overhear the conversation. (R.T. 371,372)

Carrasco met Petitioner a total of three or four times. (R.T. 371) He never saw her in Texas. (R.T. 374,429) In the factual basis of his guilty plea, he mentioned his, Ayala's, Nieto's and Dominguez' involvement. He did not mention Petitioner. (R.T. 410,411)

Jimmy Nguyen testified that he was incarcerated for distributing methamphetamine, ecstasy and cocaine. (R.T. 435,445) He was sentenced to 210 months. (R.T. 445) He was testifying with hope for a sentence reduction. (R.T. 446,463,466)

Nguyen sold to Bradley Mills and Jarrod in the Dallas area. (R.T. 435-439) Fernando Ramirez supplied methamphetamine to Nguyen until Ramirez got arrested in 2001. After that Ayala became his source. (R.T. 438,439,446,458,459)

Nguyen met Martha through Dominguez at a motel in the Fort Worth area. (R.T. 440,441,467,468) On another occasion in July he met Martha to give her a payment for methamphetamine and a car title to give to Dominguez for a 1998 Lexus GS400. (R.T. 442-444,447,448,474-476) Nguyen bought her a ticket from Dallas to Phoenix and took her to the airport. (R.T. 444) Nguyen never met Petitioner. (R.T.445)

Michael Bradley Mills testified that he was convicted of conspiracy to manufacture and distribute methamphetamine, ecstasy and cocaine in the Eastern District of Texas. He received 188 months after he entered a plea and agreed to cooperate. (R.T. 481) He was hopeful that his testimony in this case would lead to a reduction of his sentence. (R.T. 491,492)

During 2000 and 2001 he was involved in the distribution of methamphetamine. He got the methamphetamine from Jimmy Nguyen. The amount received varied. (R.T. 482,484,494) He distributed to Jack Campbell, Jarrod Anderson, and Nerio Guerrero in the Metroplex, and Josh Adamson in Waco. (R.T. 482,483) Another customer of his, Justin Hodge, distributed to Josh Anderson. (R.T. 483,484) Mills knew that part of what he distributed was going to Adamson. (R.T. 484)

Felipe Dominguez, in custody for having pled guilty to conspiracy to distribute methamphetamine and money laundering also testified. (R.T. 495,496) Part of his plea agreement was that he was to testify truthfully and if so, would have an opportunity for a sentence reduction. He originally received a sentence of 108 months (R.T. 496,580) that was later reduced to 87 months for testifying in March 2004 against John Nguyen. (R.T. 497,583)

Dominguez had also previously been convicted in 2001 in California for possession for sale of methamphetamine. He received a three year sentence. (R.T. 497, 498, 570,571) Before completing his state prison sentence he was brought to Texas in October 2002 to face the Federal charges. (R.T. 571) He started cooperating in December of 2002. (R.T. 572) He went through a series of debriefings.

(R.T. 582,583) During his last debriefing he told the agents of his wife's involvement. (R.T. 597)

Dominguez testified that in 2000 and 2001 he and Ayala got involved in delivering and selling of methamphetamine in Dallas, Texas. (R.T. 498) He started working with Ayala in 2000. He took a train from Santa Ana to Dallas and brought with him a pound and a half of ice methamphetamine. He did not get that from Petitioner. (R.T. 501,502) It came from Mexico. (R.T. 598) He claimed his subsequent source of supply of methamphetamine in California was Petitioner. (R.T. 498)

In August 2000 Dominguez met Petitioner through his wife's aunt. (R.T. 499,560,565,566) He had also met Petitioner's husband. (R.T. 500)

Dominguez said that in September 2000 he gave Petitioner $7000.00 per pound of methamphetamine. He gave her the money at a parking lot in Anaheim and she later gave him the methamphetamine at an apartment in Anaheim that used to be his apartment in 1999 before he moved to Ontario. (R.T. 503-505, 508) Petitioner took over the apartment. (R.T. 505) Ayala was with him and participated in the negotiations. (R.T. 506,507) Dominguez had told Petitioner he wanted to buy more from her. (R.T. 506)

Dominguez and his wife Maritza took the methamphetamine by train to Texas where Ayala picked him up. (R.T. 507-509) They cut the methamphetamine with MSM to make 17 pounds. It was given to Fernandez Ramirez to sell. (R.T. 508) Dominguez then received his money. (R.T. 508)

In mid September Ayala and Dominguez then went back to California to buy more methamphetamine from Petitioner. (R.T. 508,511) Dominguez called her on her cell phone number of 714-227-4282. (R.T. 509) They met Petitioner at a 7-11. She later called him and gave him the methamphetamine at the apartment. (R.T. 509-511)

Dominguez told Petitioner he was risking too much by taking the train. (R.T. 511) Petitioner told him that she had someone that would take the methamphetamine for him. Petitioner said she had a friend in Phoenix by the name of Martha. He would have to pay her $1000.00 per pound. (R.T. 512) Martha came to Anaheim and they agreed to it. (R.T. 511,512) They taped the bags of methamphetamine to Martha at the apartment; Petitioner was not there. (R.T. 514-516)

Dominguez and Ayala flew back to California. Martha Perez arrived two days later. (R.T. 516) Martha had a cell phone number of 623-363-4921 that she used during that time period. (R.T. 516,517) The number later changed to 363-5082. (R.T. 517) When she arrived she got a hotel room and called Rudy. (R.T. 517) Dominguez and Ayala went to the hotel room, picked up the dope, and paid her. She then left. (R.T. 517) The next day he and Rudy cut the dope at Rudy's girlfriend's (Jennifer Waligora) mom's place. (R.T. 517,518)

During this time period, Dominguez' cell phone number was 714-331-3711; his wife's cell number was 714-348-9046. Before June 2001 Dominguez also had a phone number of 909-923-8518. (R.T. 518-520) Ayala changed his cell phone frequently. (R.T. 520)

From August and March 2001, ten pound transactions occurred twice each month. (R.T.521) Martha Perez did the transporting for $1000.00 per pound. (R.T. 521,522)

In November 2000 a secret compartment was placed in the right door of a Tahoe. Dominguez and Carrasco drove it to California. It had $220,000 in it. Carrasco did not know the money was in it. (R.T. 603,604)

One time in December 2000 Petitioner fronted Dominguez with four pounds of ice. After Martha brought it Dominguez gave her between $180,000 and $200,000 to give to Petitioner. Martha hid it on her body. (R.T. 521-523) Part of this was Dominguez' money and the other part was Petitioner's. (R.T. 527,528)

There were occasions when Martha brought a liquid from Petitioner in California to Texas to make the methamphetamine stronger. (R.T. 523-525)

One time on November 9, 2000 Dominguez and Ayala picked Martha up at the Greyhound station in Dallas, Texas. They went to Ayala's shop, she gave them the dope and flew back to California after Ayala bought her a ticket. (R.T. 526,527)

In January 2001 Petitioner asked Dominguez if they could sell dope for her. Dominguez said he would talk to Rudy. Rudy did not want to do it, but said alright. Martha brought five pounds down for Petitioner. Dominguez' wife also gave him five pounds. It was cut and sold. (R.T. 529,530,533) The money was driven back to California by Dominguez, Petitioner, and Maritza in a Cadillac Escalade he got from Fernando Ramirez because he owed him money. (R.T. 529-530) Petitioner had come to Dallas in January or early February with Maritza because

Dominguez complained about bad dope. Petitioner brought with her a pound of good methamphetamine. (R.T. 531-535)

In 2002 Dominguez was arrested in California for methamphetamine and bailed out. He called Martha Perez to talk to Jimmy Nguyen about a title from a Lexus. Martha went to Dallas to pick up the title and $30,000. (R.T. 536,537,543)

Dominguez and Ayala stopped doing business with each other in March 2001. Petitioner did not supply to either of them after that date. (R.T. 539) Martha transported one more time in July for him. (R.T. 540-542)

Dominguez testified that Petitioner knew he was working out of Dallas, but did not discuss with her what would happen with it thereafter. (R.T. 612,613)

Records of a cell phone attributed to Petitioner showed that she had been somewhere in Texas on one or more occasion. (R.T. 632-641)

Other facts, as relevant, are stated *infra*.

IV.

REASONS FOR GRANTING A WRIT OF CERTIORARI

A. VENUE IN THE WESTERN DISTRICT OF TEXAS WAS NOT ESTABLISHED

Petitioner raised an issue at trial, in her new trial motion, and on appeal to the Fifth Circuit as to whether or not the evidence at trial had established venue in the Western District of Texas. As noted in the Opinion of the Fifth Circuit in the matter, in 1998 and 1999, in the

Northern District of Texas a group of methamphetamine dealers were plying their trade. When the leader of the group, named Valente Martinez was arrested in 1999, Rudy Ayala took over his leadership. Thereafter, Ayala became involved with Felipe Dominguez, who became a partner/supplier for Ayala. There was testimony that beginning in August 2000, through March 2001 Dominguez and Ayala obtained drugs from Petitioner, who resided in California. This process began in a substantial way, after Ayala and Dominquez went to California to meet with Petitioner. The first one or two shipments involved Felipe Dominquez and his wife taking drugs by train from California to Texas; there was testimony that on one of these occasions, Dominguez was picked up at the train station in San Antonio, and driven to the Dallas area. Thereafter, because Felipe Dominguez was concerned about personally transporting the drugs, a friend of Petitioner Fonceca named Martha Esquivel Perez, was arranged to make the drug courier trips, taking the drugs to the Dallas area in the Northern District of Texas. Cooperating witnesses testified that money shipments to pay Petitioner Fonceca occurred on several occasions, and that money was secreted in cars, and driven to California.

There was also testimony by a series of cooperating witnesses, that Ayala would cut (dilute) the drugs, and sell them, to Fernando Ramirez, among others, who in turn sold to a Jimmy Nguyen and others, who in turn sold the drugs to Brad Mills, who sold drugs in the Western District of Texas. There was no testimony that Petitioner knew of, or had any interest in the sales to Brad Mills, nor was there evidence that persons to whom Petitioner allegedly sold or supplied drugs had any interest in Brad

Mills' drugs sales, beyond supplying drugs to people who in turn did business with Brad Mills.

The Government has the burden of proving venue; the requirement is constitutional in its origin, and requires the Government to prove venue much as it would an element of the offense, except that the standard of proof is by a preponderance. *United States v. Winship*, 724 F.2d 1116,1124 (5th Cir.1984).

The requirement is mandated by Article III of the United States Constitution; as noted in the case of *United States v. Rodriguez-Moreno*, 526 U.S. 275, 119 S. Ct. 1239, 143 L. Ed. 2d 388 (1999). This Court therein further explained the focus of the inquiry to determine proper venue, Id., 526 U.S. at 279:

> As we confirmed just last Term, the "'locus delicti [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *United States v. Cabrales*, 524 U.S. 1, 6-7, 141 L. Ed. 2d 1, 118 S. Ct. 1772 (1998) (quoting *United States v. Anderson*, 328 U.S. 699, 703, 90 L. Ed. 1529, 66 S. Ct. 1213 (1946)). n1 In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts. n2 See *Cabrales*, 524 U.S. at 6-7; *Travis v. United States*, 364 U.S. 631, 635-637, 5 L. Ed. 2d 340, 81 S. Ct. 358 (1961); *United States v. Cores*, 356 U.S. 405, 408-409, 2 L. Ed. 2d 873, 78 S. Ct. 875 (1958); *Anderson*, 328 U.S. at 703-706.

Circuits have applied these rules consistently with the Fifth Circuit, finding evidence of venue insufficient where

the acts constituting the offense were not shown to have been committed within the charging district. (See, e.g. *United States v. Wood*, 364 F.3d 704 (6th Cir. 2004) (mail fraud); *United States v. Salinas*, 373 F.3d 161 (1st Cir. 2004) (passport fraud); *United States v. Ramirez*, 420 F.3d 134 (2nd Cir. 2005), certiorari denied by, *Vitug v. United States*, 126 S. Ct. 1074, 163 L. Ed. 2d 894 (2006) (mail fraud).

Where the Government fails to adduce sufficient evidence of venue, the defendant is entitled to an acquittal. *United States v. Strain*, 407 F.3d 379, (5th Cir. 2005) (on denial of rehearing). The rules for determining venue were explained in the original Opinion in *United States v. Strain*, *supra*, 396 F.3d at 693 (5th Cir. 2004).

The Court of Appeals for the Fifth Circuit held that venue was adequately proven, because of the use on at least one occasion of an Amtrak train that went to San Antonio, even though that event appears to have taken place prior to Petitioner Fonceca being involved in a conspiracy (as opposed to straight sale) and even though there is no evidence that the drugs were destined for the Western District of Texas, and even though there is no evidence that such incidental passing through a portion of the Western District of Texas was not contemplated by Petitioner. Further, the Court of Appeals for the Fifth Circuit also noted, in support of the finding of proper venue in the Western District of Texas, that Brad Mills was selling drugs into the Western District of Texas in 2002 and a hearsay statement that, prior to this, drugs had been fronted to a person named Justin Hodge. But there was no firm evidence that this occurred at a time when Petitioner Fonceca was involved, since her involvement ended not later than March of 2001.

The question presented herein is that of how far concepts of venue can be stretched to include a defendant who was never in the charging district, and who was not shown to be knowledgeable about the activities in the charging district, and about who there is little evidence that she was participating as a co-conspirator at the time of the illegal activities in the charging district.

It is generally held that where an Indictment alleges a conspiracy, which is viewed as a continuing offense, venue may be proper in any jurisdiction where the offense was started, carried out, or completed. *United States v. Parrish*, 736 F.2d 152, 158 (5th Cir. 1984).

The conspiracy alleged in Count I alleges a conspiracy to distribute more than 500 grams of methamphetamine in the Western, Southern, and Northern Districts of Texas between January 1, 1998, and July 9, 2002. There were allegations, which if taken as true on their face, would support venue in the Western District of Texas, even as to Fonceca, who has apparently never "set foot" in this district. The allegation that she was involved in a conspiracy the object of which was to distribute methamphetamine in this district by fronting quantities of the drug to Felipe Dominguez, who in turn sent the drugs to persons in the Northern District of Texas, and they distributed it to others, who in turn distributed the drugs in the Western District, would ordinarily have sufficed for this purpose. See, *United States v. Parrish*, *supra*; *United States v. Solis*, 299 F.3d 420 (5th Cir. 2002).

However, the evidence adduced at this trial has established the existence of multiple conspiracies, and moreover has established that Fonceca's allegedly illegal activities predominantly occurred in California, and

occurred over a short period of time during an overall conspiracy that had lasted for several years. There is no evidence that Fonceca had any participation in a separate conspiracy (if any there was) to distribute controlled substances in the Western District of Texas. This follows for several reasons.

In order to find venue on a conspiracy theory as to a defendant who did not personally commit acts within the charging district, it must first be shown that the defendant was a member of the charged conspiracy at the time of those acts. *United States v. Solis*, *supra*, 299 F.3d at 447. (See also, *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998), holding venue in Missouri improper as to money laundering counts committed in Florida as to drug money sent from Missouri, and holding that the propriety of venue in conspiracy charge is dependent upon the agreement alleged and proven.) Addressing an analytically similar situation to that in the present case, the Seventh Circuit found the evidence of venue insufficient in the case of *United States v. Tingle*, 183 F.3d 719, 727-728 (7th Cir. 1999):

> Of course, if the indictment had alleged that Tingle had distributed cocaine base to Allen Judon (or others) in the Eastern District of Wisconsin, venue would have been proper there, regardless of the fact that Tingle never left Illinois. But this is a separate offense from the distribution to Rathers, and any attempt to allege these two offenses in one count of the indictment would have resulted in a duplicity problem. n4 *United States v. Marshall*, 75 F.3d 1097, 1111 (7th Cir. 1996) ("'Duplicity' is the joining of two or more offenses in a single count."). As it is, the indictment did not allege this distribution to Judon or anyone

> other than Rathers. Because the government failed to show that even part of the crime of distributing cocaine base to Oscar Rathers occurred in the Eastern District of Wisconsin, it was not a proper venue for her trial on this charge. Moreover, the fact that the government alleged that Tingle aided and abetted the crime of distribution of cocaine base to Oscar Rathers cannot save her conviction, for the cocaine base was distributed to Oscar Rathers only in Illinois, and any aiding and abetting done by Tingle was done in Illinois.

And it should be noted that merely selling a saleable quantity of drugs to a buyer, does not necessarily prove a conspiracy between the buyer and seller. This issue was well explained in the Seventh Circuit case of *United States v. Thomas*, 284 F.3d 746, 751 (7th Cir. 2002).

Finally, in this regard, it bears mention that evidence of venue in the Western District of Texas, as to any act of money laundering that could be attributed to Petitioner Fonceca, was lacking. The evidence tended to show only that Petitioner received money sent from the Northern District of Texas (in the Dallas area) and received it in California. Pursuant to the authorities cited above, it is respectfully submitted that such evidence could not supply proper proof of venue in the Western District of Texas. *United States v. Cabrales*, *supra*; *United States v. Strain*, *supra*.

B. SUFFICIENCY AS TO COUNT II, MONEY LAUNDERING

The evidence as to any conspiracy on the part of Fonceca, as to Count II, money laundering is not entirely

clear. The Indictment alleged Count II as a conspiracy either to conduct a financial transaction to promote the illegal enterprise, or to conceal the nature, source, location or ownership of the funds. At trial, the Government took the position that money laundering is shown any time that money is transferred in interstate commerce with the intent either to disguise the source of the funds, or to promote an illegal enterprise. Thus, argued the Government, Petitioner Fonceca could be held liable for a conspiracy to commit money laundering if either she agreed to the movement of money from Texas to California by Martha Perez, or by Ayala, or Dominguez. It was also argued that Petitioner Fonceca was guilty of a conspiracy to commit money laundering because co-conspirators had taken their own profits and had invested the money in real estate and other assets. (R.T. 661-664).

It is respectfully submitted that the Government's view of the gravamen of money laundering in the context of the present case is both too broad and too amorphous. Yet the Court of Appeals for the Fifth Circuit found the evidence sufficient, largely on the theory that other co-conspirators as to the drugs conspiracy charge had put money into real estate, and had funneled money through cars owned under fictitious names, and also because money had been shipped to Petitioner secreted in door panels of cars. (Opinion, pp. 14-17) The elements of money laundering pursuant to 18 U.S.C. section 1956(a)(1)(B)(I) are explained in the case of *United States v. Bieganowski*, 313 F.3d 264, 279 (5th Cir. 2002):

> The offense of money laundering under section 1956(a)(1)(B)(I), requires that the government prove that the defendant: (1) conducted or attempted to conduct a financial transaction, (2)

> that the defendant knew involved the proceeds of unlawful activity, and (3) that the defendant knew was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity. 18 U.S.C. § 1956(a)(1)(B)(I); *United States v. Burns*, 162 F.3d 840, 847 (5th Cir. 1998), cert. denied, *August v. United States*, 526 U.S. 1076, 119 S. Ct. 1477, 143 L. Ed. 2d 560 (1999).

And the requirement that there be evidence of an intent to conceal or disguise the nature of the funds, beyond a mere effort to hide the funds for transportation, was squarely addressed in this Court's Opinion on the case of *United States v. Cuellar*, 441 F.3d 329 (5th Cir. 2006), which dealt with international money laundering, but which explained that the "conceal or disguise" element is the same for the various kinds of money laundering. In a footnote, 441 F.3d at 333, fn.3, this Court stated:

> In other words, "the government must prove that the defendant intended to conceal the nature, location, source, ownership, or control of the proceeds of the unlawful activity." *United States v. Cihak*, 137 F.3d 252, 261 (5th Cir. 1998) (emphasis added) (citing *United States v. Dobbs*, 63 F.3d 391, 397-98 (5th Cir. 1995)).

And this Court in *Cuellar* went on to explain, Id., 441 F.3d at 333-334:

> We held that if the defendant's purchases were "engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the concealment prong of the money laundering statute." Id. (citing *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1995) (emphasis added). Concealment

> of the money facilitated the transaction but was not itself the design of defendant's activity, so no money laundering occurred, and the statute was not violated. "The requirement that the transaction be designed to conceal implies that more than this trivial motivation to conceal must be proved." Id.
>
> The alleged laundering activity is Cuellar's transportation of the cash across the border to an unknown recipient. The underlying purpose of the enterprise, as the government presented it to the jury, was to get the money to Mexico. Concealing the money in the hidden compartment was the means employed to achieve this, but the concealment itself was not the "design" of Cuellar's activity, as the statute requires; the concealment was merely ancillary to Cuellar's design.
>
> Taking hidden cash to Mexico is not money laundering unless some further design to conceal can be proved.

The Indictment, as noted, also alleges a conspiracy to commit money laundering in the sense that a financial transaction was conducted with the intent to promote specified illegal activity. In this context, the Indictment alleges that persons collected and transported monies to Petitioner Fonceca in California, as payment for drugs. Fifth Circuit case law has held that money laundering can be found where its intent is to promote already committed felonious conduct. *United States v. Valuck*, 286 F.3d 221, 226 (5th Cir. 2002). But the Indictment as to this count does not specify on which act it relies, and in reality, multiple conspiracies are shown. First, a conspiracy to open bank accounts, purchase assets, and conduct other

transactions, none of which had any relationship to Petitioner Fonceca. As to Petitioner Fonceca, the only evidence on this count appears to be her receipt of money for drugs allegedly supplied by her to Felipe Dominguez (who in turn supplied it to Ayala).

But the "promotion" aspect of section 1956 is not satisfied by showing merely that the transaction promoted the enterprise; it must be shown that the transaction was done for the purpose of so promoting. *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999).

However, it also appears that merely spending ill gotten gains from prior illegal activity is not an act of money laundering, unless those funds are being reinvested to promote the activity, or have some function beyond the spending for personal use (and inferentially for the receipt). *United States v. Cavalier*, 17 F.3d 90 (5th Cir. 1994)

There are, consistent with the foregoing, limits to the scope of the statute. Merely showing, as did the evidence in the present case, that Felipe Dominguez and/or Rudolfo Ayala made repeated payments to a drug supplier (allegedly Petitioner Fonceca) does not establish money laundering, especially on the part of the recipient. This much appears to have been established in the Court's Opinion in the case of *United States v. Dovalina*, 262 F.3d 472, 476 (5th Cir. 2001).

In the present case, there is no evidence that Petitioner Fonceca engaged in any conspiracy to disguise or conceal the funds, or their nature; all the evidence shows is that she repeatedly received payment for what the Government claims were the drugs she sold to Dominguez. In fact the evidence tends to show that these were arms-length transactions, and that Fonceca had no connection

to the organization in Texas, other than that she supplied drugs to Dominguez (and incidentally to Ayala). Her receipt of the funds was mere payment, and the Government failed to prove that there was an intent or an agreement on the part of Fonceca to otherwise promote activity.

Thus, it is respectfully submitted that the evidence is insufficient to establish that Fonceca was involved in a conspiracy to launder funds. She certainly had no connection whatever to the examples upon which the Government relied, involving the investing of monies and opening of bank accounts.

C. THE DISTRICT COURT ERRED IN REFUSING TO ORDER DISCLOSURE OF REPORTS OF DEBRIEFINGS

Petitioner Fonceca repeatedly sought disclosure of full reports relating to the debriefings of the cooperating witnesses. This was sought to show inconsistencies in the statements, and to show that Appellant Fonceca was not named by function or otherwise in the initial debriefings. The Court declined to so order, and declined the Government's offer to provide the reports *in camera.* (R.T. 3-5) Even after it was established that formal reports of a series of debriefings existed (R.T. 178-182, 185, 191-193), still no disclosure was ordered. Appellant Fonceca maintained that the information was *Brady-Giglio* material. (*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).) (R.T. 203-204) The importance of this was underscored by the apparent fact that Maria Fonceca did not come up as a potential participant until Felipe Dominguez so disclosed it in his

second interview in January 2003 (but it is not even then clear that the reference included a last name, and it also became clear that he was then withholding the name of his wife "Maria" or "Maritza." (R.T. 139-141, 175-182) Later in the trial, the Government did offer a limited disclosure of a part of one of the reports, but it was so limited that the offer was declined. (R.T. 653-655)

The Fifth Circuit has decided, in a number of holdings in cases such as *United States v. Martinez*, 87 F.3d 731 (5th Cir. 1996), which held that a debriefing report which is not a substantially verbatim account of the witness' statement, is not discoverable as Jenck's Act material. But it is respectfully submitted that on the facts of the present case, *Martinez* is factually distinguishable, is subject to limitations, is wrongly decided, and that the debriefings in the present case were discloseable as *Brady-Giglio* information. See also, *East v. Johnson*, 123 F.3d 235, 237 (5th Cir. 1997).

Cases subsequent to *Martinez* have noted a distinction between discovery of an agent's handwritten notes and a formal 302 Report, signed by the agent. The former is often held not subject to disclosure at least where the report is not inconsistent with the handwritten notes. *United States v. Brown*, *supra*. See also, *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997). (And see, also, *United States v. Coe*, 220 F.3d 573, 583 (7th Cir. 2000) (cited in *Brown*, and making the same distinction between rough notes and a signed 302 report).)

Certainly where the information contained in a formal report of a debriefing constitutes *Brady-Giglio* information, it is subject to disclosure.

It should also be emphasized in the present case that the district court declined the Government's offer to

submit the documents for the court's review, to determine any disclosure issues. It is respectfully submitted that this, too, was error, and it is a point of distinction between the present case and the situation in *Brown*.

Finally, yet another distinction appears in the present case. The agent who wrote, and who attended a number of the debriefings testified to the content of those debriefings, and the reports he signed. (R.T. 190-191) That report was a statement of a witness on a subject about which he was testifying, and it is respectfully submitted, should have been viewed as Jenck's Act material.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant a Writ of Certiorari in this matter and reverse the previously issued decision and Petitioner's conviction.

Dated: June 16, 2007

Respectfully submitted,

MICHAEL IAN GAREY
Attorney for Petitioner
Maria Guadalupe Fonceca

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51373

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTHA ESQUIVEL PEREZ; MARIA GUADALUPE FONCECA,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

(Filed March 19, 2007)

Before GARWOOD, WIENER, and CLEMENT, Circuit Judges.

GARWOOD, Circuit Judge:*

Appellants Fonceca and Perez were found guilty by a jury of conspiracy to possess with intent to distribute in excess of 500 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846, and of conspiracy to

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

commit money laundering in violation of 18 U.S.C. § 1956(h). Their convictions arose out of their participation in a vast methamphetamine distribution conspiracy that stretched from California to Texas, and involved numerous transactions and conspirators. Fonceca was identified as the supplier of the methamphetamine distributed in Texas and also as a participant in several covert monetary or financial transactions designed to facilitate the conspiracy to distribute methamphetamine. Perez was shown to be a courier, or mule, for the organization, illegally transporting money and methamphetamine between California and Texas.

Both appellants challenge their convictions, contending that venue in the Western District of Texas was improper. In addition, Fonceca also challenges the sufficiency of the evidence supporting her conviction for money laundering conspiracy, alleges that the district court erred by restricting her cross-examination of a government witness and co-conspirator, Dominguez, and by refusing to order disclosure of a government agent's reports or debriefing notes, and also argues that the district court erred in denying her motion for mistrial due to the improper admission of 404(b) evidence through witness testimony. Perez also challenges her sentence, claiming the district court erred by sentencing her to a sentence longer than that of her cooperating co-conspirators.

We affirm.

I. Factual Background

This appeal emerges from a case pertaining to a drug distribution conspiracy that stretched between southern California and Texas, involving numerous conspirators,

copious amounts of methamphetamine, and many financial transactions varying in nature. In early January 1998, Rudy Ayala (Ayala) and others began acquiring large amounts of methamphetamine from sources in Texas, California, and Mexico to distribute in the Dallas area. When the head of the organization, Valente Martinez, was arrested in 1999, Ayala assumed control of the Dallas-area drug distribution activities. In July or August 2000, Ayala met Felipe Dominguez (Dominguez), an individual from southern California who was visiting Dallas. They soon realized they had a business compatibility – Ayala needed methamphetamine to distribute and Dominguez ostensibly had sources in California from whom he could obtain the drugs.

After a few methamphetamine-cash exchanges in which Dominguez and his wife transported methamphetamine from California to Texas themselves, Ayala flew to California to meet the source. There he met the ultimate supplier to the conspiracy, appellant Fonceca, who agreed to continuously supply Ayala and Dominguez with methamphetamine.

Ayala began receiving biweekly shipments in ten-pound amounts of methamphetamine fronted by Fonceca and transported by Dominguez from August 2000 to March 2001. In mid-September 2000, after Dominguez became uncomfortable with transporting drugs himself, Fonceca arranged for her friend, Perez, from Phoenix, Arizona to begin transporting the methamphetamine from California to Texas in exchange for $1,000 per pound of methamphetamine transported. Perez ultimately made an estimated thirteen trips transporting methamphetamine or cash money between California and Texas. Perez often used Amtrak trains or Greyhound

buses to travel, concealing the drugs or money by taping packages to her body underneath a large shirt. Other times she drove a blue Astro van. Another courier for the conspiracy, Steven Carrasco (Carrasco), would also make deliveries of methamphetamine, and several times drove vehicles to California for Ayala. The vehicles were to be received as payments for drugs and often had large amounts of cash hidden in the door panels. Several times Fonceca received vehicles from Ayala in exchange for methamphetamine, and Ayala never put the vehicles' titles in his name nor transferred title when Fonceca took possession.

Once the methamphetamine arrived in Dallas, Ayala would cut the methamphetamine and then would front it to Fernando Ramirez, Jimmy Nguyen and others, who would distribute it to Brad Mills and others. Brad Mills would then sell the methamphetamine to parties in Waco and West, both in the Western District of Texas.

Based on the cooperating co-conspirators' testimony and government's investigation, Perez was held accountable for the distribution of 130 pounds of methamphetamine. Perez was sentenced to concurrent terms of 292 months' imprisonment for conspiring to possess with intent to distribute methamphetamine (Count One) and of 240 months for conspiracy to launder money (Count Two).[1] Fonceca was held accountable for the distribution of 140 pounds of methamphetamine, and was sentenced to

[1] On the drug conspiracy count Perez was sentenced to five years' supervised release; on the money laundering conspiracy she was sentenced to two years' supervised release concurrent with that on the drug count. A fine of $500 (below guideline because of inability to pay) was imposed on each count.

concurrent terms of 294 months for conspiracy to possess with intent to distribute (Count One) and of 240 months for money laundering (Count Two).[2]

II. Discussion

A. Venue in Western District of Texas

Both appellants assert that, with respect to each count, the government failed to offer evidence sufficient to support venue in the Western District of Texas. Since the appellants' conspiracies of money laundering and methamphetamine possession with intent to distribute were intertwined, the venue-propriety analysis is generally the same for each count with which the appellants were charged. "[W]e previously have said that '[w]e review all questions concerning venue under the abuse of discretion standard.'" *United States v. Strain,* 396 F.3d 689, 692 (5th Cir. 2005) (quoting *United States v. Brown,* 250 F.3d 907, 912 (5th Cir. 2001)). However, both appellants contend there was insufficient evidence presented at trial to support venue on either count so the district court erred in denying their motions for directed verdict at the conclusion of the case. Hence, "the relevant question for this court is whether the Government presented the jury with sufficient evidence to support a finding that [the defendants'] offense[s] '[were] begun, continued or completed in the Western District of Texas.'" *Id.* "[C]ircumstantial evidence alone is sufficient to establish venue" so long as

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[2] On Count One a ten year term of supervised release was imposed; on Count Two the term of supervised release was three years, concurrent with that on Count One. A fine of $1,000 (below guideline range due to inability to pay) was imposed on each count.

venue is proved by a preponderance of the evidence. *United States v. Loe,* 248 F.3d 449, 465 (5th Cir. 2001).[3]

We have repeatedly held that, for continuing offenses like those charged here, "venue in conspiracy cases is proper in any district where the agreement was formed or where an overt act in furtherance of the conspiracy was performed." *United States v. Pomranz,* 43 F.3d 156, 158-59 (5th Cir. 1995); 18 U.S.C. § 3237(a); *see also United States v. Solis,* 299 F.3d 420, 445 n.76, n.77 (5th Cir. 2002); *United States v. Winship,* 724 F.2d 1116, 1125 (5th Cir. 1984). Therefore, in this case, venue may permissibly lie in any district where an overt act in furtherance of the conspiracies was committed – even if appellants themselves never entered the district at issue. *United States v. Caldwell,* 16 F.3d 623, 624 (5th Cir. 1994); *United States v. Parrish,* 736 F.2d 152, 158 (5th Cir. 1984). And this is so even though an overt act is not an element of the conspiracy charged in either count here. *See Whitfield v. United States,* 125 S.Ct. 687, 690-93 (2005). It has been stated that for this purpose:

> "The act must occur subsequent to the formation of the conspiracy agreement and prior to or in completion of the conspiratorial objective. It also must have been done in furtherance of the accomplishment of that objective . . . No distinctions are drawn based on the importance of the act to the accomplishment of the objective or on the legality of the act. A simple and commonplace

[3] Since the allegations of the indictment are sufficient to support venue in the Western District of Texas, complaint as to venue was properly raised by defendants' Rule 29(a), FED. R. CRIM. P., motions made at the close of the government's case in chief (neither defendant having thereafter presented any evidence). *See Strain,* 396 F.3d at 693.

> legal activity may be sufficient, even though the action may be one that would have been taken in any event even had there been no illegal purpose. The act can be that of a single conspirator or even an innocent agent who is acting at his direction. The other conspirators need not have counseled the commission of the act nor even have been aware that it was to be done."[4] (footnotes omitted)

For money laundering conspiracy offenses, venue based upon an overt act in furtherance of the conspiracy being committed in the district of prosecution is provided for in 18 U.S.C. § 1956(i)(2) ("in any . . . district where an act in furtherance of the . . . conspiracy took place") and such venue is likewise appropriate under 18 U.S.C. § 3237(a), so our analysis proceeds on the basis of section 3237(a) as to both counts.

In the present case, the record clearly supports venue in the Western District. Testimony established that the conspirators used an Amtrak train on at least one occasion to transport methamphetamine to San Antonio, from

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[4] 4 LaFave, Israel & King, Criminal Procedure (2d Ed. 1999), § 16.2(f) at 538 (footnotes omitted). *See also, e.g., United States v. Johnson,* 165 F.2d 42, 45 (3d Cir. 1947) (" . . . it is not necessary that an overt act in furtherance of conspiracy necessarily be a criminal act . . . an innocent act by a third party, if caused by a previous act or contact on the part of one of the conspirators, would be enough . . . the filing of the trustee's report . . . itself a perfectly legal act, may be an overt act in furtherance of the conspiracy if such filing is part of the general plan of the conspirators with regard to the subject matter in which the report is filed." (footnotes omitted)); *Winebrenner v. United States,* 147 F.2d 322, 325 (8th Cir. 1945) ("If . . . Mellor was induced by Winebrenner to make a fraudulent bid on work . . . even though Mellor was innocent, the conspiracy was brought within . . . the Western District of Missouri, where the contracts were carried out.").

whence conspirators drove the drugs to Dallas, Texas. San Antonio is indisputably within the Western District of Texas.[6] Appellants argue that that particular act took place in a different conspiracy since a different man became the leader of the organization after that particular drug transportation trip. However, the drugs involved all originated with Fonceca, before and after the San Antonio stop-over, and were destined for distribution in the same areas. These are the same parties and same drug-source for whom Perez regularly transported. The evidence was sufficient for the jury to find that the transportation of Fonceca's methamphetamine from California to San Antonio (and thence to Dallas) was part of the charged conspiracy. *See United States v. Morrow,* 177 F.3d 272, 291 (5th Cir. 1999). *See also United States v. Therm-All, Inc.,* 373 F.3d 625, 637 (5th Cir. 2004); *United States v. Morgan,* 117 F.3d 849, 858 (5th Cir. 1997).

Further, Brad Mills' testimony established distribution of methamphetamine, pursuant to the conspiracy, in the Western District of Texas. Appellants contend that they were no longer participating in the conspiracy at the time Mills moved to the Western District in 2002 and began directly distributing there. However, Mills specifically testified that he distributed the methamphetamine to Joshua Adamson in West in 2000 and 2001 (before Mills

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[6] San Antonio is within the Western District of Texas though it is located within a different division than is Waco. However, that does not alter our analysis since there is no constitutional right to be tried in a particular division within a district. *United States v. McKinney,* 53 F.3d 664, 673 (5th Cir. 1995). Venue is generally determined on a district, rather than a division, basis. *See* Rule 18, FED. R. CRIM. P.; 18 U.S.C. § 3237(a). We are aware of no special contrary provision applicable to either of the instant offenses.

moved to Waco), and Nguyen testified that he began fronting to Mills in early 2001 the same methamphetamine he obtained from Ayala and Dominguez. Mills further explained that he also fronted methamphetamine (which had been fronted to him by Nguyen) to Justin Hodge, who lived in Waco, and to Adamson, who lived in West. Both West and Waco are in McClennan County, which is within the Western District of Texas. Prior to 2002 Hodge fronted some of that methamphetamine to Adamson in West. While Hodge and Adamson sometimes had to travel to the Dallas area to obtain the methamphetamine from Mills (and to pay him for drugs he previously fronted to them, using proceeds of their sale of the fronted drugs) prior to 2002, they obtained a quarter-pound to a pound of methamphetamine each time, amounts sufficient to shown intent to distribute within their home bases in the Western District.

The money laundering count (Count Two) alleged that Fonceca and Perez and others conspired, contrary to 18 U.S.C. § 1956(h), to commit one or more of the following offenses, namely: (1) conducting and attempting to conduct a financial transaction (involving property known to represent proceeds of unlawful activity) with intent to promote the specified unlawful activity of the conspiracy to distribute and to possess with intent to distribute methamphetamine, contrary to 18 U.S.C. § 1956(a)(1)(A)(i); and/or (2) conducting and attempting to conduct a financial transaction (involving property known to represent proceeds of unlawful activity) knowing it was wholly or partially designed to conceal the nature, location, source, ownership or control of proceeds of the specified unlawful activity of the conspiracy to distribute and to possess with intent to distribute methamphetamine, contrary to 18 U.S.C.

§ 1956(a)(1)(B)(i); and/or (3) engaging in, and attempting to engage in, monetary transactions in property derived from the specified unlawful of conspiracy to distribute and to possess with intent to distribute methamphetamine, contrary to 18 U.S.C. § 1957(a). This count goes on to allege that "[t]he conspiracy was executed in the following manner through the following means." It was alleged, among other things, that as a part of the conspiracy, methamphetamine was distributed "on a consignment basis, that is 'fronted'" by Fonceca in California and transported to Texas, in part by Perez, and was fronted by conspirator Ayala to, among others, Nguyen, and that "these people would then front" that methamphetamine to "Mills and others, including people in the Western District of Texas, Waco Division." It was further alleged that when the methamphetamine was sold and "currency" was "collected," it made its way back up the distribution chain and ultimately a portion of the currency made its way back to Fonceca in California, sometimes transported there from Texas by Perez.

The evidence sufficed to allow the jury to find by a preponderance of the evidence that, for example, the fronted conspirators who distributed the methamphetamine in the Western District of Texas took some of the currency proceeds of the sales they made there and, in or partly in the Western District of Texas, transported and delivered those currency proceeds to the conspirator who had fronted the drugs to them, and that such a delivery and disposition (see section 1956(c)(3)) of the currency constituted a financial transaction (see section 1956(c)(4) & (5)) in property known to represent the proceeds of the unlawful activity of the distribution of methamphetamine and was entered into by both conspirators who were

parties thereto with the intent to promote the methamphetamine distribution conspiracy alleged in Count One, contrary to 18 U.S.C. § 1956(a)(1)(A)(i). Such would plainly constitute an overt act in the Western District of Texas in furtherance of the Count Two conspiracy. More generally, the jury could find by a preponderance of the evidence that the money laundering conspiracy charged in Count Two included the making of sales of methamphetamine in the Western District of Texas and the collection of a portion of the currency proceeds of such sales and the laundering of such proceeds, including laundering that took place outside of the Western District. For venue purposes, the overt act need not be the whole crime, but merely an act (including, in a proper case, an act of a non-conspirator caused by a previous act or contact by a conspirator) in furtherance of the conspiracy. *See* note 4 *supra* and accompanying text.[6]

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[6] Also, the evidence here would permit a finding that there was in essence a single conspiracy with two interdependent illegal objectives, each of which materially furthered the achievement of the other, the first objective being to possess methamphetamine with intent to distribute it and/or to distribute it, contrary to 21 U.S.C. § 841(a)(1), and the second objective being to "launder" proceeds of the methamphetamine so distributed, contrary to 18 U.S.C. § 1956(a)(1)(A)(i), and/or § 1956(a)(1)(B)(i), and/or § 1957(a). Because conspiring for the purpose of the first objective is denounced by 21 U.S.C. § 846, and conspiring for the purpose of the second objective is denounced by a different statute, namely 18 U.S.C. § 1956(h), two offenses (one for conspiring for the first objective, the other for conspiring for the second objective) may properly be charged (and convicted for) notwithstanding there is in fact essentially only a single conspiracy (albeit with two unlawful objectives). *Albernaz v. United States,* 101 S.Ct. 1137, 1142-43 (1981). The rule is otherwise where only a single conspiracy statute is violated. *Braverman v. United States,* 63 S.Ct. 99, 101-02 (1942).

Appellants' reliance on *United States v. Cabrales,* 118 S.Ct. 1772 (1998), is misplaced, for there the Court was careful to point out that "*[n]otably,* the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others." *Id.* at 1776 (emphasis added). *Cabrales* also specifically distinguished *United States v. Hyde,* 32 S.Ct. 793 (1912) (holding that venue for a conspiracy prosecution was proper in a district where an overt act took place although defendant had never been there and the conspiracy was not formed there), on the ground that it was a conspiracy prosecution. *Cabrales,* at 1776-77 ("By contrast, the counts at issue in this case allege no conspiracy. They describe activity in which Cabrales alone, untied to others, engaged"). Here, by contrast, the *only* offenses alleged are conspiracies and the evidence shows agreement and concerted action among defendants and many others and the movement of drugs from California to Texas (including the Western District) and of the proceeds of the sale of the drugs from Texas (including the Western District) back to California with laundering thereof along the way. Compare *Cabrales,* at 1777 ("The counts before us portray her [Cabrales] and the money she deposited and withdrew as moving inside Florida only"). In *United States v. Rodriguez-Moreno,* 119 S.Ct. 1239, 1244 (1999), the Court reaffirmed the validity of *Hyde.* Again, in *Whitfield v. United States,* 125 S.Ct. 687, 693 (2005), the Court reiterated that for a conspiracy prosecution under section 1956(h) "venue is proper in any district in which an overt act in furtherance of the conspiracy is committed, even where an overt act is not a required element of the conspiracy offense." *See also, e.g., United States v. Nichols,* 416 F.3d 811, 823-24 (8th Cir. 2005); *Prosper v. United States,* 218 F.3d 883, 884 (8th Cir. 2000).

We find no merit in appellants' contention that venue laid in the Western District of Texas was improper.

B. Sufficiency of Evidence to Support Fonceca's Money Laundering Conspiracy Conviction

Fonceca argues that the evidence is insufficient to support her conviction for conspiracy to money launder (Count Two).[7] Fonceca claims the evidence only shows that she repeatedly received payment for her merchandise and does not show that she conspired with the others to disguise or conceal the funds.

We "must affirm if a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Lopez,* 74 F.3d 575, 577 (5th Cir. 1996). We review the evidence *de novo,* in the light most favorable to the prevailing party. *United States v. Resio-Trejo,* 45 F.3d 907, 910 (5th Cir. 1995). Credibility and factual determinations are resolved in favor of the jury's verdict. *Id.* at 911.

Fonceca was convicted of conspiracy to money launder in violation of 18 U.S.C. § 1956(h) (Count Two). "'Direct evidence of a conspiracy is unnecessary; each element may be inferred from circumstantial evidence. . . . An agreement may be inferred from a "concert of action."'" *United States v. Virgen-Moreno,* 265 F.3d 276, 284-85 (5th Cir. 2001).

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[7] Except with respect to venue, as discussed in part IIA above, Perez does not challenge the sufficiency of the evidence as to either count and Fonceca does not challenge the sufficiency of the evidence as to the drug distribution conspiracy (Count One).

The money laundering charges alleged as a basis of the conspiracy charge included violations of 18 U.S.C. §§ 1956(a)(1)(A)(i), and/or 1956(a)(1)(B)(i), and/or 1957(a). The elements required to establish money laundering under section 1957(a) are: "1) property valued at more than $10,000 was derived from specified unlawful activity . . . ; 2) [the perpetrator] engaged in a monetary transaction with this property; and 3) [the perpetrator] knew that this property was derived from unlawful activity." *United States v. Wilson,* 249 F.3d 366, 379 (5th Cir. 2001). To establish money laundering under section 1956(a)(1), the government must prove that "1) [the perpetrator] conducted or attempted a financial transaction, (2) which he knew involved proceeds arising from unlawful activity, (3) with the intent to promote or further those illegal actions [section (a)(1)(A)(i)], or (4) with the knowledge that the transaction's design was to conceal or disguise the nature or source of the illegal proceeds [section (a)(1)(B)(i)]." *United States v. Pennell,* 409 F.3d 240, 243 (5th Cir. 2005). The "defendant need not have specifically intended to conceal or disguise the proceeds of the unlawful activity" as "[i]t is sufficient for the defendant merely to be aware of the perpetrator's intent to conceal or disguise the nature or source of the funds." *United States v. Adair,* 436 F.3d 520, 524 (5th Cir. 2006). Compensating co-conspirators for their participation in the conspiracy in order to continue the illegal activity is sufficient to show promotion or carrying on of unlawful activity. *Wilson,* 249 F.3d at 377-78.

Fonceca's arguments fail, and the elements of the charge of conspiring to money launder were adequately shown. The evidence showed that members of the conspiracy would conspire to transport currency from Texas to

Fonceca in California by utilizing bank accounts, businesses, and numerous assets. Additionally, many of the assets – particularly automobiles – were placed in fictitious names to conceal and disguise the nature and ownership of the assets. Several times, large amounts of cash proceeds from the drug trade (approximately $150,000 in one trip) used to further the methamphetamine conspiracy were transported from Texas to Ayala and Fonceca in California, hidden in the door panels of a Chevrolet Tahoe SUV. The government also presented evidence of Perez's furtive courier runs between California and Texas to transport both cash and methamphetamine for the purpose of continuing the unlawful activity.

The jury could have inferred from the significant amount of evidence presented that Fonceca had engaged in a conspiratorial agreement to violate money laundering laws in an effort to conceal the illegal nature of the substantial funds exchanging hands facilitating and furthering the carrying on of this drug distribution conspiracy. *See Virgen-Moreno,* 265 F.3d at 285-86.

C. *Brady-Giglio* or Jencks Act Material: Government Agents' Witness Debriefing Notes

We review a district court's rulings regarding discovery under the Jencks Act for clear error. 18 U.S.C. § 3500; *United States v. Brown,* 303 F.3d 582, 591 (5th Cir. 2002). *Brady* determinations are reviewed *de novo. East v. Johnson,* 123 F.3d 235, 237 (5th Cir. 1997).

Fonceca argues that the district court erred by refusing to require disclosure of a government agent's reports relating to the debriefings of cooperating witnesses as required by the Jencks Act. Fonceca also contends that the

material was potentially *Brady-Giglio*[8] material. Finally, Fonceca contends that the reports should have been discoverable in any case because the agent who wrote the reports testified at trial. Fonceca's arguments do not succeed.

First, the agent who drafted the reports of the witness interviews was himself a witness at trial but he did not testify about what the co-conspirators told him in the course of his witness interviews. We have held that a testifying agent's report of a witness interview is a statement discoverable as to the agent under the Jencks Act but only if and to the extent it relates to the subject matter of the agent's direct testimony. *United States v. Welch,* 810 F.2d 485, 490 (5th Cir. 1987); *United States v. Gaston,* 608 F.2d 607, 612 (5th Cir. 1979). Also, the agent's reports or notes are not Jencks Act material as to a testifying co-conspirator who is not shown to have adopted the statements in the reports or notes. 18 U.S.C. § 3500(e); *United States v. Martinez,* 87 F.3d 731, 736-37 (5th Cir. 1996); *Welch,* 810 F.2d at 490. Fonceca's assertion that the notes could be used to impeach the testifying co-conspirators is purely speculative. Appellant's arguments are unavailing, especially considering that the government had an open-file policy and had tendered the notes or reports to the

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[8] *Brady v. Maryland,* 83 S.Ct. 1194, 1196-97 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Giglio v. United States,* 92 S.Ct. 763 (1972) (holding that prosecution's duty to present all material evidence to the jury was not fulfilled when it became known the government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony).

district judge for *in camera* inspection. The fact that the district court declined the government's invitation to examine the notes or reports does not convert them to discoverable Jencks Act material. We have held that the district court only has a duty to make such an *in camera* inspection of alleged Jencks Act material "if a timely request is made by the defense *and* some indication exists in the record that the notes meet the Jencks Act's definition of a statement." *United States v. Hogan,* 763 F.2d 697, 704 (5th Cir.), *opinion withdrawn in part,* 771 F.2d 82 (5th Cir. 1985). There is no such indication here. Additionally, there was no request that the material at issue be made a part of the record on appeal.

Fonceca has not shown error.

D. Restriction of Fonceca's Cross-Examination of Dominguez

Fonceca argues that the district court erred by sustaining the prosecution's objections to her cross-examination of Dominguez regarding aspects of Dominguez's plea agreement. Fonceca claims her Sixth Amendment right to confrontation was violated because she was unable to ask Dominguez about the "factual basis" underlying his plea agreement.

Since Fonceca did not object to the district court's rulings below, we review for plain error. *United States v. Mares,* 402 F.3d 511, 520-21 (5th Cir. 2005). We will correct an error shown to be plain if Fonceca establishes (1) an error (2) that is plain or obvious (3) and that affects appellant's substantial rights. *United States v. Olano,* 113 S.Ct. 1770, 1776-77 (1993). We exercise our discretion to

correct an error that affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Fonceca has not met her burden on this issue. She was allowed to cross-examine Dominguez concerning his incentives to testify under his plea agreement, and Fonceca was able to pose similar questions as those denied to another co-conspirator, Carrasco, regarding the factual basis of his plea agreement. Also, Fonceca was able to ask Dominguez about various inconsistencies in his multiple debriefings with the government. Fonceca has not established that the limitations on her cross-examination were clearly prejudicial and prevented the jury from hearing sufficient information to "appropriately draw inferences relating to the reliability of the witness." *United States v. Restivo,* 8 F.3d 274, 278 (5th Cir. 1993).

E. Denial of Fonceca's Motion for Mistrial due to Inadvertent Admission of 404(b) Evidence

We review the denial of a motion for mistrial for abuse of discretion. *United States v. Akpan,* 407 F.3d 360, 366 (5th Cir. 2005). When a defendant's motion for mistrial alleges prejudicial testimony, there is reversible error only if the evidence, when viewed in the context of the trial as whole, is so highly prejudicial that it likely would have had a "substantial impact" on the jury's verdict. *United States v. Limones,* 8 F.3d 1004, 1007-08 (5th Cir. 1993).

Before the trial began, both defense counsel and the government agreed that no 404(b) evidence, including that of past crimes, would be offered. However, while defense counsel was questioning Dominguez, a government witness, the following statement mentioning Fonceca's previous

time spent incarcerated was inadvertently elicited in violation of the 404(b) agreement:

> "DEFENSE COUNSEL: Did you know that Maria – and that's Maria Fonceca – and the woman Meeka were they friends?
>
> DOMINGUEZ: Yes. They married ten years ago when they make time in jail. [sic]
>
> DEFENSE COUNSEL: May we approach, Your Honor?
>
> COURT: I'm sorry?
>
> DEFENSE COUNSEL: Motion to strike as nonresponsive and I'd also like to approach.
>
> COURT: Sure.
>
> DEFENSE COUNSEL: The nonresponsive answer just now with the witness that was put before the jury my client has been in jail at some point in the past, I think I'm duty bound to move for a mistrial based on that. I am so moving under the circumstances. I don't see how I can do other but I'll submit it.
>
> . . .
>
> COURT: I'm not going to grant a mistrial at this point.
>
> DEFENSE COUNSEL: Okay. That's fine. I'll proceed on."

This testimony was not struck and the jury was not instructed to disregard it. No lawyer or witness referred to that testimony at any other time during the trial.

Even assuming error, in light of the significant amount of other evidence in the case, this inadvertent

remark is not so highly prejudicial that it would have had a "substantial impact" on the jury's verdict. *Limones,* 8 F.3d at 1007-08. We do not find reversible error.

F. Perez's Sentence

We review *de novo* the district court's guidelines interpretations. *United States v. Duhon,* 440 F.3d 711, 714 (5th Cir. 2006). We accept the district court's fact findings unless they are clearly erroneous. *Id.* We review the sentence for unreasonableness considering the provisions of 18 U.S.C. § 3553. *Id.*

Perez argues that the disparity between her sentence and that of her co-conspirators was unwarranted, and asserts this point of error for two reasons:

> "(1) to preserve the issue in the event the Supreme Court decides that under facts similar to those in this case the disparity is not warranted; and (2) . . . because of the timing of her arrest and her inclusion in the case as a defendant, she was not presented with any opportunity to provide substantial assistance and therefore was not similarly situated to the co-conspirators who testified against her."

Perez was sentenced to 292 months' imprisonment, while her co-conspirators (other than Fonceca) were sentenced to significantly lower sentences due to their assistance to the government in prosecuting this case.

We rejected an argument similar to Perez's in *Duhon,* 440 F.3d at 720 (holding that "sentencing disparity produced by substantial assistance departures was intended by Congress and is thus not a proper sentencing consideration under section 3553(a)(6)"). *Duhon* noted that

district courts should "avoid disparity among similarly-situated defendants *nationwide* rather than disparity with [the defendant]'s differently situated codefendant." *Duhon,* 440 F.3d at 721 (emphasis added).

Perez's attempts to distinguish her situation from that in *Duhon* are unavailing. There is no requirement that the government provide equal opportunities for cooperation to all co-defendants. We affirm Perez's sentence.

III. Conclusion

For the foregoing reasons, we AFFIRM the convictions and sentences of appellants Fonceca and Perez.

AFFIRMED